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No. 89-731

In The

Supreme Court of the United States

October Term, 1989

FRANK ROSENBERG, INC., an Illinois Corporation,

Petitioner,

vs.

TAZEWELL COUNTY, a Body Politic; JERRY APPENZELLER, JAMES CARIUS, JAMES DAWSON, FRED ERTMOED, KENNETH EUBANKS, THOMAS FABRY, ROBERT B. FORSYTH, ROBERT LUTZ, LARRY NOREUIL, WILMA O'DONNELL, and RALPH PALUSKA, Individually, and Members of the Tazewell County Board,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petitioner has a property interest sufficient to support its standing to sue or its claims under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is unreported and it appears at pages A12 through A33 in the Appendix to the Petition. The opinion of the Court of Appeals is reported

at 882 F.2d 1165 and the slip opinion is reproduced at pages A1 through A11 in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTE INVOLVED

Illinois Revised Statutes, 1985, Ch. 111½, Par. 1039.2:

"(a) The county board of the county . . . shall approve the site location suitability for such new pollution control facility only in accordance with the following criteria:

(i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;

(ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

(iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

(iv) the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation, or the site is flood-proofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department;

> (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents;
>
> (vi) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows; . . . ."

STATEMENT

As stated in the complaint the respondent "Tazewell County Board is a legislative body vested with the powers and duties imposed upon it by state law and to form the official policies of Tazewell County", Illinois. [Complaint, par. 7]. The individual respondents are the members of the Tazewell County Board who voted against the site location permit constituting a subject matter of this litigation. [Complaint, par. 25 (Petition A37)].

Petitioner, Frank Rosenberg, Inc. (Rosenberg) is the owner of a tract of land in an unincorporated area of Tazewell County, Illinois. By letters from Kirby-Coffman Inc. (Kirby) dated September 23, 1985 and February 14, 1986, Rosenberg claims to have entered into a contract to sell that real estate.[1] In pertinent part the letters state:

> The obligation to purchase the property is conditioned upon and binding in the event that

[1] By affidavit dated May 5, 1988, Rosenberg made those letters a part of the record in the district court. Without the exhibit setting out the legal description of the real estate involved, the letters are reproduced in the Appendix to this Brief. [A1-A4].

> Kirby-Coffman Inc. and/or its affiliates, including members of any consortium of which Kirby-Coffman Inc. is now a member signs a contract to construct or participate in the construction of a waste to energy or other co-generation facility providing steam or energy to a purchaser located within one mile of the boundaries of the property. . . . . [A1].
>
> This letter will confirm our intent to purchase the real estate . . . from Frank Rosenberg, Inc. consisting of 90 acres more or less located in Tazewell County, Illinois *conditioned upon successfully completing the necessary contractual arrangements and funding of the planned ethanol production facility.* [A3 (emphasis added)].

Kirby's planned use of the real estate was for a "regional pollution control facility" within the meaning of the Illinois Environmental Protection Act [Ill.Rev.Stat. 1985, Ch. 111½, Pars. 1001, *et seq.*]. Accordingly, site location approval was required from the Tazewell County Board [Ill.Rev.Stat. 1985, Ch. 111½, Par. 1039.2 (*ante*, 2)].

On April 14, 1986, Kirby applied for site location approval. Rosenberg did not join in the application. After public hearings, a majority of the County Board denied the application on September 25, 1986 and specifically found that the criteria required by paragraph 1039.2 (a) (i), (ii), (iii) and (vi) *ante* 2, had not been met. This decision could have been but was not appealed.[2]

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[2] Illinois holds that a County Board's site approval proceedings are adjudicatory functions [*City of Rockford v. Illinois Pollution Control Board*, 125 Ill.App.3d 384, 465 N.E.2d 996 (1984)]. Ill.Rev.Stat., 1985, Ch. 111½, Par. 1040.1, authorized an

(Continued on following page)

This action was instituted under 42 USC §1983 and alleged *inter alia:*

> 29. The refusal of the Tazewell County Board to approve the siting application of Kirby-Coffman Inc. had no reasonable basis, was against the manifest weight of the evidence presented to the Board and was an arbitrary and capricious action that amounted to a confiscation of plaintiff's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. [Petition, A4-A5].
>
> 30. The Defendant members of the Tazewell County Board who voted to deny the location request of Kirby-Coffman Inc., acted in their individual and official capacities in an arbitrary and capricious manner with a deliberate and reckless disregard of the Plaintiff's constitutional rights and as a consequence the Plaintiff was deprived of its property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. [Petition, A5].

Respondents moved to dismiss on several grounds including the assertions that "the Plaintiff has alleged no

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appeal to the Illinois Pollution Control Board. The decision of the County Board can only be reversed if the Pollution Control Board finds that it is against the manifest weight of the evidence. [*E. E. Hauling Inc. v. Pollution Control Board*, 116 Ill.App.3d 586, 608, 415 N.E.2d 555 (1983)]. Furthermore, under Illinois law either Kirby or Rosenberg could have brought an original mandamus proceeding in the appropriate Illinois circuit court. [See: *Soloman v. City of Evanston*, 29 Ill.App.3d 782, 331 N.E.2d 380 (1975)].

property interests which is protected by the United States Constitution" and that "the Complaint fails to state a claim for violation of due process." [Petition, A12 & A13]. At the hearing on the motion to dismiss the district court raised the issue of plaintiff's standing to sue and requested supplemental briefs. [Petition, A14].

Citing *Board of Regents v. Roth*, 408 U.S. 564 (1972) [Petition, A26 & A27] the district court "recognize(d) that its analysis of the standing issue has brought into play both traditional elements of standing and a discussion of the property interest itself." [Petition, A31]. It granted the "Motion to Dismiss on the grounds that the Plaintiff has no actionable property interest in the issuance of the site location permit, and consequently, no standing to bring the instant action." [Petition, A33]. *Inter alia*, the district court's "ORDER" states:

> This court's reading of the documents involved in creating the contract between the Plaintiff and Kirby is that there were at least six conditions precedent to Kirby's obligation to purchase the property from the Plaintiff. As a result the court must find that this agreement between the Plaintiff and Kirby gave rise only to an expectation that the agreement would be consummated. As such, the injury which the plaintiff now alleges is deemed by this court to be insufficient to establish 'a distinct and palpable injury to himself', 'injury in fact' or 'direct injury.' [Petition, A30-A31].
>
> ---
>
> In sum, the court finds that the Plaintiff had nothing more than a mere expectation that Kirby would purchase the land when all of the

> conditions precedent to the agreement were satisfied. . . . Thus, in this court's opinion, the Tazewell County Board cannot be said to have unconstitutionally deprived this Plaintiff of any property, in light of the fact that the court finds that the Plaintiff had no actionable property interest in the issuance of the permit. [Petition, A32-A33].

On appeal the Seventh Circuit found that the petitioner lacked standing to sue and affirmed the judgment of the district court. Here again, the court found that there was no "distinct and palpable injury" and stated:

> Here the record plainly demonstrates that the County Board rejected *Kirby's* application not Rosenberg's. Under the contractual relationship between them it is clear that it was Kirby's obligation to attempt to secure the appropriate permits. Indeed, the only expectation that Rosenberg could have had under the agreement was that Kirby would purchase the land if its efforts in securing the permits were successful. This expectation hardly transforms Kirby's lack of success into a 'distinct and palpable injury,' *Warth*, 422 U.S. at 490, to Rosenberg. [Petition, A8].

ARGUMENT

1.

The Decisions Below Are Clearly Correct

Despite Rosenberg's assertions that it was a "contract seller of land" that is not the case and the courts below

are clearly correct in holding that it had no constitutionally protected property interest subject to injury in fact *a fortiori* standing to sue.

Even if it can be said that Rosenberg had standing to sue, its complaint nevertheless failed to state a claim for relief under the Due Process Clause.

The absence of property interest subject to injury in fact also constitutes the absence of a constitutionally protected property interest under the Due Process Clause of the Fourteenth Amendment. "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it." [*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)]. In order to have a legitimate claim of entitlement the claimant " 'must demonstrate an expectation . . . that was legally enforceable, a mutually binding obligation.' (Citations omitted). This expectation must be something which is securely and durably yours under state (or federal . . .) law as distinct from what you hold subject to so many conditions as to make your interest meager, transitory or uncertain." [*Common v. Williams*, 859 F.2d 467, 470 (7th Cir. 1988) quoting from *Upadhya v. Langenberg*, 834 F.2d 661, 665 (7th Cir. 1987) and *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 417 (7th Cir. 1985)].

In this case Rosenberg claims a "reasonable expectation that the Rosenberg Industrial Park would have been purchased for $2,500,000 by Kirby-Coffman." [Complaint, par. 28a.]. But that claim refers to nothing more than 2 letters "subject to so many conditions as to make (its)

interest meager, transitory or uncertain." It is plainly clear that petitioner's "expectation that the Rosenberg Industrial Park would have been purchased for $2,500,000" was nothing more than a subjective and unilateral expectancy not protected by due process.

Even if we further assume that Rosenberg has standing to sue in tandem with a property interest protected by due process, its complaint still fails to state a claim upon which relief can be granted. At best, Rosenberg's federal claim is predicated on substantive due process. As stated in Justice Powell's concurring opinion in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985):

> Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property rights are protected by procedural due process even though the interest is derived from state law rather than the Constitution, Board of Regents v. Roth, 408 U.S. 564, 577, substantive due process rights are created by the Constitution.

Moreover, *Kauth v. Hartford Insurance Co. of Illinois*, 852 F.2d 951, 957 (7th Cir. 1988) holds that state created property rights are not protected by substantive due process "in keeping with the Supreme Court's refusal to 'make the Fourteenth Amendment a font of tort law to be superimposed upon whatsoever system may already be administered by the States'. *Parratt*, 451 U.S. at 544."[3]

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[3] *Parratt v. Taylor*, 451 U.S. 527 (1981).

2.

There is No Conflict of Decisions

Petitioner's singular reason for granting the writ is that the decision below conflicts with the decision of the First Circuit in *Free v. Landrieu*, 666 F.2d 698 (1981). At page 14 of the Petition there is a quote from the *Free* opinion in support of this assertion.

The quoted language is nothing more than gratuitous dicta. Standing to sue was not even an issue in *Free v. Landrieu* and this is obvious from the following quotes from the First Circuit's opinion:

> On June 2, 1980 the defendant filed a motion to dismiss the complaint on the ground that it had become moot since the commencement of the action. On April 3, 1981 the district court granted the motion and dismissed the action and the plaintiff appealed. [666 F.2d at 699].

> The only issue presented to us is whether the district court erred in granting the defendant's motion to dismiss the complaint on the ground of mootness. [666 F.2d at 70].[4]

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[4] The First Circuit affirmed.

CONCLUSION

For the foregoing reasons, and for others implicit therein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

KCInc

Kirby-Coffman, Inc.
842 South Second Street Springfield, Illinois 62704
(217) 522-2388

September 23, 1985

Mr. Bernard Rosenberg
P.O. Box 519
Pekin, Illinois 61555-0519

Dear Mr. Rosenberg

This will confirm our agreement to purchase property owned by Frank Rosenberg, Inc. lying between Route 29 and the Chicago and Northwestern Railroad in Section 9, Township 24 North, Range 5 West, Cincinnati Township, Tazewell County, Illinois (the property).

The obligation to purchase the property is conditioned upon and binding in the event that Kirby-Coffman, Inc. and/or its affiliates, including members of any consortium of which Kirby-Coffman, Inc. is now a member, signs a contract to construct or participate in the construction of a waste to energy or other co-generation facility providing steam or energy to a purchaser located within one mile of the boundaries of the property. The purchase price will be $25,000 per acre, payable within 15 days of the signing of the contract referred to in the preceding sentence. Frank Rosenberg, Inc. shall simultaneously convey the property to Kirby-Coffman, Inc., or its designee, by good and sufficient warrant deed, subject

to easements and restrictions now of record. Kirby-Coffman, or its designee shall have 15 days from the transfer of title to object to any defects in title and you shall have a reasonable time, not less than 30 days, to cure any such defects.

As further consideration for this agreement, Frank Rosenberg, Inc. grants Kirby-Coffman, Inc. a right of first refusal to purchase the property for one year from the date of this letter. During such period if Rosenberg receives an offer from a third party to purchase the property, he shall convey the terms of such offer in writing to Kirby-Coffman, Inc., who shall have 15 days to match the terms of the offer and purchase the property. If Kirby-Coffman, Inc. does not purchase the property within the 15 days period, Rosenberg shall be free to sell the property to the third party.

Mr. Bernard Rosenberg
September 23 1985
Page 2

In addition to and as a part of this Agreement, Kirby-Coffman, Inc. agrees to pay Bernard Rosenberg a consulting fee for assistance in developing a waste to energy facility an amount equal to One Hundred Thousand Dollars ($100,000) for each Tri-Mo-Gen module built by Kirby-Coffman, Inc. and affiliates. A Tri-No-Gen facility is described as a waste to energy unit producing 600,000,000 pounds of steam per year. This consulting fee agreement is applicable to waste to energy facilities developed in Tazewell County only by Kirby-Coffman, Inc.

Please acknowledge your acceptance of this Agreement in the space provided below.

KIRBY-COFFMAN, INC.

BY /s/ John L. Kirby
Its President

FRANK ROSENBERG, INC.

BY /s/ John L. Kirby
Its President

DATE 9-23-85

KCInc

Kirby-Coffman, Inc.
842 South Second Street Springfield, Illinois 62704
(217) 522-2388

February 14, 1986

Mr. Bernard Rosenberg
P.O. Box 519
Pekin, Illinois 61555-0519

Dear Bernard,

This letter will confirm our intent to purchase the real estate described on the attachment labeled #1 from Frank Rosenberg, Inc. consisting of 90 acres more or less located in Tazewell County Illinois conditioned upon successfully completing the necessary contractual arrangements and funding of the planned ethanol production facility. The agreed purchase price is Two Million Five

Hundred Thousand Dollars payable when the first funds for the planned project are available for distribution.

A new corporation to be known as Kirby-Coffman Tazewell is being chartered as the Special Purpose Corporation for the project and will be the entity through which funds will flow, titles and permits will be held.

The consulting fee agreement set out in the September 23, 1985 land purchase agreement remains in full force and effect when and if Kirby-Coffman Tazewell constructs a Tri-Mo-Gen facility on the above described property.

Please acknowledge your acceptance of this update of our original agreement dated September 23, 1985.

Sincerely,
/s/ John L. Kirby, Pres.
John L. Kirby, President
Kirby-Coffman, Inc.

/s/ Bernard Rosenberg
BERNARD ROSENBERG FOR
FRANK ROSENBERG, INC.

JLK:bjd